SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

73-894

No. 73-

COMMONWEALTH OF PENNSYLVANIA and PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioners,

v.

JOHN F. NASH, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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JOHN F. NASH, *et al.*,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FOR THE THIRD CIRCUIT

The Petitioners, Commonwealth of Pennsylvania and Pennsylvania Public Utility Commission, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this proceeding on September 7, 1973.

OPINIONS BELOW

The judgment of the U.S. Court of Appeals, not yet reported, is printed as Appendix A hereto. The unreported order of the U.S. District Court is printed as Appendix B hereto.

JURISDICTION

The judgment of the U.S. Court of Appeals was entered on September 7, 1973. (App. A). The jurisdiction of this court is conferred by 28 U.S.C. 1254(1), 2101(c).

QUESTION PRESENTED

May a U.S. District Court refuse to decide a case seeking to enjoin an unlawful railroad abandonment, and dismiss the action, on the ground that a railroad reorganization court, situated in another district, is more familiar with the financial condition of the railroad?

STATUTE INVOLVED

The statute involved is section 1(20) of the Interstate Commerce Act, 49 U.S.C. 1(20), which authorizes an action to enjoin the abandonment of a railroad line, in the absence of an I.C.C. certificate, in any court of competent jurisdiction, at the suit of any State railroad commission or party in interest.

The full text of the statute is set forth in Appendix C hereto.

STATEMENT

This is an action to enjoin the abandonment of a 27-mile line of railroad in the absence of a certificate from the Interstate Commerce Commission. The complaint was brought by the Commonwealth of Pennsylvania and Pennsylvania Public Utility Commission under the injunctive provisions of section 1(20) of the Interstate Commerce Act, 49 U.S.C. 1(20).

Lehigh Valley Railroad Company (Lehigh Valley) operates a branch line between Montrose and Tunkhannock, known as the Montrose branch, in the Northeastern portion of Pennsylvania, situated wholly within jurisdiction of the U.S. District Court for the Middle District of Pennsylvania.

Lehigh Valley is in reorganization, pursuant to section 77 of the Bankruptcy Act, 11 U.S.C. 205, in the District Court for the Eastern District of Pennsylvania.[1]

Lehigh Valley on February 27, 1973, notified the shippers situated on the Montrose branch that service would be discontinued at 12:01 a.m. the following day, due to track conditions.[2]

The Commonwealth and Public Utility Commission filed their action March 9, 1973 in the U.S. District Court for

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[1] Bank No. 70-432. Lehigh Valley petitioned for reorganization as part of Penn Central's plan of reorganization. Lehigh Valley entered reorganization in July, 1970, following Penn Central's entry in June, 1970. District Judge John P. Fullam is assigned to both proceedings.

[2] Lehigh Valley at the same time also discontinued service on its so-called Naples branch, extending 15.5 miles between Geneva and Rushville, N.Y. It is conceded by all parties below that Lehigh Valley has in fact abandoned the Montrose branch within the meaning of section 1(20) of the Interstate Commerce Act, as it has no intention of resuming operation unless directed to do so by a court or upon denial of its abandonment application by the Interstate Commerce Commission. See: *Meyers v. Jay Street Connecting Railroad*, 259 F.2d 532, 535 (2d Cir. 1958).

the Middle District of Pennsylvania at Scranton, Pa. to enjoin the abandonment service as being in violation of Section 1(18, 20) of the Interstate Commerce Act. The principal offices of the Commonwealth and Public Utility Commission are situated at Harrisburg, Pa., in the Middle District of Pennsylvania. Trial was held March 15, 1973 at Wilkes-Barre, Pa.[3] Six shippers located on the Montrose branch testified at the trial.

The district court on March 19, 1973 dismissed the complaint. Its decision rested upon *forum non conveniens*, but without express mention of the doctrine. The district court concluded that it should decline to exercise its jurisdiction with respect to an injunction against the abandonment, such decision more properly being a matter for the informed discretion of the Lehigh Valley reorganization court, situated in the Eastern District of Pennsylvania at Philadelphia, Pa., since that court is more conversant with the financial condition of the railroad and bears ultimate responsibility for its reorganization.

The Court of Appeals affirmed on September 7, 1973. It noted that the Commonwealth and Public Utility Commission were still free to institute an action in the reorganization court, and that the latter court is "better equipped" to deal with the merits.

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[3] On March 14, 1973, the day prior to trial, Lehigh Valley's trustees made an *ex parte* request of their reorganization court for permission to file an application with the I.C.C. for the abandonment of the Montrose branch, which was granted by the reorganization court. The abandonment application awaits assignment for hearing by the I.C.C. However, all line abandonment hearings have been held in abeyance by the agency, pending its appeal to the Second Circuit from the district court's injunction in *Harlem Valley v. Stafford*, 360 F.Supp. 1057 (S.D.N.Y. 1973).

> "Inasmuch as the reorganization court is more conversant with the financial condition of the Lehigh Valley Railroad, we, too, feel that that court is better equipped to deal with the merits of appellants' claims relating to abandonment of the Montrose branch."

The Court of Appeals emphasized that the order does not constitute a bar to the bringing of an action in the Eastern District of Pennsylvania.

REASONS FOR GRANTING THE WRIT

THE THIRD CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The decision below requires that public agencies sue in a railroad reorganization court to prevent unlawful cessation of railroad service, rather than in the courts of traditional statutory venue. Here, the plaintiffs reside and have their principal offices within the jurisdiction of the U.S. District Court for the Middle District of Pennsylvania; the railroad is doing business in and operates the involved branch line within that jurisdiction; the shipper witnesses all are engaged in business on the involved branch line within the jurisdiction; and no objection was made to improper venue by the railroad or its trustees.

Section 1(20) of the Interstate Commerce Act specifically provides for suits against a railroad operating trustee in any court of competent jurisdiction to enjoin an unlawful abandonment. The section reads, in part:

> "Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for nor more than three years, or both."

Section 1(20) is the exclusive means to enjoin the unlawful abandonment of a line. *Powell v. United States,* 300 U.S. 276, 277-78 (1937); *I.C.C. v. Memphis Union Station Company,* 230 F.Supp. 456 (W.D. Tenn. 1964), aff'd 360 F.2d 44 (6th Cir. 1966), cert. den., 385 U.S. 830.

I. The familiarity of a Court with a Railroad's Financial Condition should not Override Plaintiff's Choice of Venue

This court has observed, "There is a local interest in having localized controversies decided at home.[4] *Gulf Oil*

[4] In the trial in the district court of Wilkes-Barre, six businessmen testified as to the serious injury occasioned by their loss of rail service on the Montrose branch. The Public Utility Commission presented two engineering witnesses.

Corp. v. Gilbert, 330 U.S. 501, 509 (1947). The 1948 amendment to the Judicial Code, with section 1404(a), served to make a codification and revision of the *forum non conveniens* doctrine.[5] *Ex Parte Collett*, 337 U.S. 55 (1949); *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955).

Even assuming that the district court should have transferred the case to the reorganization court situated in the Eastern District of Pennsylvania, rather than dismiss the action, the sole basis would be "in the interest of justice", for here the convenience of the parties and the witnesses are *all* in the Middle District of Pennsylvania. The Judicial Code provides:

> "Sec. 1404 – (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The question of the "convenience of the court" has received scant attention. The district court stated in *Brown v. Insurograph*, 85 F.Supp. 328, 329-30 (D. Del. 1949):

> "The convenience of the court considering transfer or of the court to which transfer is sought is not an allowable standard or criterion except as may be embraced in the term 'in the interest of justice'."

The inability of a judge to be available at a given location for an extended period of time is a factor to be

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[5] For a general discussion of forum non conveniens, see: *Blair, P., The Doctrine of Forum Non Conveniens*, 29 Col. L. Rev. 1 (1929); Braucher, R., *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908 (1947).

considered in determining whether to transfer an action. *Pfizer, Inc. v. Lord,* 447 F.2d 122, 125 (2d Cir. 1971). However, the general rule was recently stated in another circuit. *Federal Savings and Loan Insurance Corp. v. Krueger,* 435 F.2d 633, 637 (7th Cir. 1970):

> "Unless there is an explicit exception to the duty of a federal court to hear a case to which Congress has extended its jurisdiction, that duty may not be disregarded."

The so-called "interest of justice" in this case appears to be protection of the financial interests of the railroad. The question whether a railroad has abandoned a line without a certificate from the I.C.C. can be just as easily resolved – if not better resolved – by the court near the scene at Wilkes-Barre as by the reorganization court at Philadelphia. It is settled that a reorganization court does not have exclusive jurisdiction over all controversies that in some way affect the debtor's estate. *Calloway v. Benton,* 336 U.S. 132, 142 (1949).

II. The Matter of Sudden Cessation of Railroad Operations is of Pressing Public Importance.

There are a number of railroads in reorganization in the Third Circuit. Several of these railroads, or their reorganization courts, have announced threats to cease operations, in whole or in part, unless certain financial relief is forthcoming from state or federal agencies. For example, the reorganization court for Penn Central Transportation Company, *sua sponte* on March 6, 1973, announced it was highly doubtful the railroad could be permitted to operate

beyond October 1, 1973. *In Re Penn Central Transportation Company*, 355 F.Supp. 1343.[6]

The trustees of Lehigh Valley have a petition pending in their reorganization court for cessation of operations, as noted by the district court. (App. B).

The reorganization court for The Central Railroad Company of New Jersey authorized the suspension of all freight service in Pennsylvania on April 1, 1972. This was sustained by the Third Circuit. *In Re Central R. Co. of New Jersey*, 455 F.2d 989 (3rd Cir. 1972). Approval by the Interstate Commerce Commission had not been obtained. *Central R. Co. of New Jersey—Abandonment*, 342 I.C.C. 227; *Routing via Oak Island Jct., New Jersey*, 341 I.C.C. 129. The Court of Appeals later, *en banc*, questioned the prior ruling in the absence of state or federal regulatory approval, and reversed the railroad reorganization court's directive that all passenger service be terminated in New Jersey. *In Re Central R. Co. of New Jersey* (No. 73-1006 & 73-1027, August 27, 1973).[7]

Certain bondholders have a petition pending for cessation of operations in the Reading Company reorganization court.[8]

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[6] See also: 363 F.Supp. 1263. The Interstate Commerce Commission, in its report of September 28, 1973, found the railroad's financial posture not to be as gloomy as asserted by the trustees. F.D. No. 26241, Penn Central Transportation Reorganization (Mimeo).

[7] Petition for certiorari pending in No. 73-742, *Timpany v. State of New Jersey, et al.*

[8] Bank. No. 71-828 (E.D. Pa.) *In Re Reading Company.*

The decision below, in effect, allows a trustee to cease the operation of a railroad line, subject only to later review by his reorganization court. This acts to strip the public of effective relief from the sudden termination of railroad service. Moreover, owing to the extensive nature of most railroad lines, the shipping public would be put at great inconvenience in being forced to try its case in a distant reorganization court.

The matter of sudden cessation of railroad operations is of serious public concern.

CONCLUSION

For these reasons, the Court should issue a writ of certiorari to review the judgment of the Third Circuit.

Respectfully submitted,

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December, 1973

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73-1248

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Plaintiffs-Appellants,

v.

JOHN F. NASH, ROBERT C. HALDEMAN and
LEHIGH VALLEY RAILROAD COMPANY,
Defendants-Appellees.

Before: STALEY, ADAMS and GIBBONS, *Circuit Judges.*

On Appeal from the United States District Court
for the Middle District of Pennsylvania

JUDGMENT ORDER

Appellants, the Commonwealth of Pennsylvania and the Pennsylvania Public Utility Commission, brought an action in the District Court for the Middle District of Pennsylvania against the Lehigh Valley Railroad and its trustees. Relying upon section 1(20) of the Interstate Commerce Act, appellants sought in the Middle District to enjoin the abandonment of operations along Lehigh Valley's Montrose branch until the railroad had secured a certificate of public convenience and necessity from the Interstate Commerce Commission. The Lehigh Valley is presently undergoing reorganization in the District Court for the Eastern District of Pennsylvania.

After careful consideration of the briefs and arguments of counsel in this matter, we have determined to affirm the order of the court below dismissing the complaint.

Section 77 of the Bankruptcy Act vests in a reorganization court exclusive jurisdiction over a debtor and its property. 11 U.S.C. § 205(a). The court below explicitly adverted to this fact in dismissing the complaint. It also made reference to the fact that Order No. 1 of the reorganization court – the District Court for the Eastern District – purported to restrain and enjoin all persons from commencing any litigation against the Lehigh Valley. However, we need not decide now whether the Bankruptcy Act or Order No. 1 precluded the entertainment of this action in the district court. For, even assuming that that court had jurisdiction over the action, and that such an action was not within the proscription of Order No. 1, we think that the district court was within the bounds of its discretion in dismissing the complaint.

The order of dismissal issued by the court below expressly contemplates the institution of an action in the reorganization court seeking the same relief. Inasmuch as the reorganization court is more conversant with the financial condition of the Lehigh Valley Railroad, we, too, feel that that court is better equipped to deal with the merits of appellants' claims relating to abandonment of the Montrose branch. The order of the court below does not constitute a bar to the bringing of another such action in the Eastern District, since it did not adjudicate any of the merits raised by the complaint.

It is hereby ORDERED that the judgment of the district court is affirmed. Costs to be taxed against the parties equally.

BY THE COURT

/s/ Arlin M. Adams
Circuit Judge

Attest:

/s/ Thomas F. Quinn
Clerk

Dated: September 7, 1973.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA and PENNSYLVANIA PUBLIC UTILITY COMMISSION,	:	
Plaintiffs,	:	No. 73-157
v.	:	Civil
JOHN F. NASH, ROBERT C. HALDEMAN and LEHIGH VALLEY RAILROAD COMPANY,	:	
Defendants		

ORDER

A Complaint having been filed on March 9, 1973, in which plaintiffs seek to preliminarily and to permanently enjoin suspension of operations on the Montrose branch of the Lehigh Valley Railroad pending issuance of a certificate from the Interstate Commerce Commission that the present or future public convenience and necessity permit of abandonment of operations, 49 U.S.C.A. § 1(18)-(20); and it appearing that the Lehigh Valley Railroad Company is presently in reorganization in the United States District Court for the Eastern District of Pennsylvania, In the Matter of Lehigh Valley Railroad Company, Bankruptcy No. 70-432 (E.D. Pa.); and the reorganization court therefore possessing exclusive jurisdiction of the debtor and of its property wherever located, 11 U.S.C.A. §205(a) (Supp. 1973); and it appearing that Paragraph 10 of Order No. 1 of the reorganization court restrains and enjoins all persons from in any manner interfering with the assets or operations of the debtor and from commencing or continuing any proceeding against the debtor for any purpose, with specified exceptions not relevant herein, 11 U.S.C.A. §205(j); and it further appearing that the reorganization court

has authorized the trustees to apply to the Interstate Commerce Commission for authority to abandon the Montrose branch of the Lehigh Valley Railroad, subsequent compliance with any forthcoming authorization being expressly conditioned upon further order of the reorganization court pursuant to 11 U.S.C.A. §205(o), Order No. 159, In the Matter of Lehigh Valley Railroad Company, Bankruptcy No. 70-432 (E.D. Pa., filed March 15, 1973); and it further appearing that the Lehigh Valley Railroad Company has petitioned the reorganization court to allow it to discontinue all railroad operations by October 1, 1973; and a hearing having been held at which evidence was introduced that the resumption of safe operations on the Montrose branch of the Lehigh Valley Railroad would require a significant expenditure of funds; and it therefore appearing that this court should decline to exercise its jurisdiction with respect to the interim decision whether to grant the relief requested pending the issuance or denial of a certificate by the Interstate Commerce Commission, such decision more properly being a matter for the exercise of the informed discretion of the reorganization court since that court is more conversant with the financial condition of the debtor and bears ultimate responsibility for its reorganization, *cf.* New Haven Inclusion Cases, 1970, 399 U.S. 392, 419-430; *Pennsylvania v. Penn Central Transportation Company*, M.D. Pa. 1972, 348 F.Supp. 28, 31;

It is ORDERED that the complaint is dismissed.

/s/ Michael H. Sheridan
Chief Judge
Middle District of Pennsylvania

Dated: March 19, 1973.

APPENDIX C

Section 1(20) of the Interstate Commerce Act, 49 U.S.C. 1(20):

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.